No. 3991.

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES H. WOODS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF WASHINGTON, NORTHERN DIVISION.

PETITION FOR REHEARING.

JOHN F. DORE,

Seattle, Washington

Attorney for Plaintiff in Error.

J. L. MACDONALD CO., PRINTERS AND PUBLISHERS, SEATTLE

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Comes now the plaintiff in error and petitions for a rehearing in this cause, and assigns the following reasons:

In the decision filed in this cause on June 18, 1923, the decisive point is correctly stated as calling for a determination of the question as to whether one cannot be guilty of selling liquor, and be innocent of possession of the idenitcal liquor with the intention of selling the same. After stating the question in dispute accurately this court says:

"That depends upon the facts."

The trouble with the decision rendered is that the basic facts are not those set forth in the record. In the opinion it states that the defendant is a druggist, and admitted having the alcohol in his possession. This statement is partly true, and partly false. The government in this case introduced in evidence three bottles of alcohol. This alcohol was grain alcohol and was concededly fit for beverage purposes. This is the alcohol which the government contended the defendant possessed, and it was this alcohol that the government contended that the defendant sold. The government's entire evidence related to this grain alcohol. The jury found that the defendant sold two bottles of this grain alcohol, and the jury found that the defendant did not possess these two bottles of grain alcohol. If the defendant sold the grain alcohol that the government contends he sold, then at the time he sold it he possessed that identical alcohol with the intention of selling it in violation of the prohibition law.

The possession of the alcohol with the intent to sell it, as to the matter of time, is coincident with the time of the sale. The information charges that at the moment that he sold it he possessed it with the intent to sell it, in violation of the law, and

that he did sell it in violation of the law. It would be no defense for the druggist to say I came into possession of this alcohol ninety days ago with the purpose of disposing of it according to law, in good faith, for medicinal purposes. Any court would instruct the jury that it made no difference whether his possession was legal or illegal prior to the time of sale. The evidence shows that the illegal possession and illegal sale were based upon the same period of time. How a person can sell intoxicating liquor, in violation of law, at a particular moment, and at the same moment possess the same identical intoxicating liquor with no purpose of violating the law, is impossible of solution. There is an apparent inconsistency between the two findings.

Where this court has gone wrong is, that it has overlooked the fact that the government introduced no evidence that the defendant ever possessed any alcohol, but the three bottles of grain alcohol. There was no evidence by any person that he ever had any other alcohol in his possession fit for beverage purposes. There is no evidence in the case that he ever had a permit to possess any alcohol whatsoever, of any kind or description. A druggist, by reason of his occupation, has no reason to possess alcohol or

other intoxicating liquor; he must have a permit to purchase it, and the evidence shows that the defendant never possessed a permit. The defendant never contended that he possessed any grain alcohol. The defendant at no time ever admitted that he had any alcohol fit for beverage purposes. The defendant contended that what he possessed was three bottles of medicated alcohol, introduced in evidence, bearing poison labels, and admittedly unfit for beverage purposes. If he possesed and sold these three bottles he was guilty of no offense whatsoever. If he possessed and sold the three bottles the government contended that he possessed he was guilty of both possession and sale. The decision overlooks the fact there were only six bottles in dispute. If the defendant sold the alcohol that he testified that he possessed, then he sold alcohol that was unfit for beverage purposes, and there would be no evidence in the case to sustain the verdict of a sale. So when the opinion says that the defendant admitted the possession of the alcohol, the statement is partly true, and partly false, because it omits to set forth what particular alcohol the defendant admitted he had. This was the fact the trial court overlooked.

A careful analysis of the evidence, bearing in mind at all times there were only in this case six bottles of alcohol—three bottles of poison alcohol, unfit for beverage purposes, which the defendant admitted he possessed and sold, and three bottles of grain alcohol, fit for beverage purposes, which the government contended by its information he possessed with intent to sell in violation of law, and which the government contends, and the jury found, that he did sell in violation of law.

If this honorable court will set down at the head of the opinion the fact, as the evidence shows, there were only six bottles in dispute, the matter will clear itself up.

A rehearing should be granted, or at least the opinion should be re-written, unless this court wishes to adopt the practice of deciding cases on matters that are absolutely outside of the record. In the opinion an instruction of the trial court is set forth, but the transcript of the record contains no instructions whatsoever. As the basis for the decision the purported instructions of the trial court are set forth. An examination of the transcript will show there are no instructions in it. It has always been

the rule of this Circuit, and every other Circuit, that cases would be decided on what appeared in the transcript of record. There are no instructions in the transcript.

For the foregoing reasons plaintiff in error respectfully contends that he should be granted a rehearing.

JOHN F. DORE,

Attorney for Plaintiff in Error.

I, John F. Dore, attorney for Plaintiff in Error, hereby certify that in my judgment the petition for a rehearing is well-founded, and that it is not interposed for delay.

JOHN F. DORE,

Attorney for Plaintiff in Error.